

KLAMATH RIVERKEEPER

An Affiliate of the Waterkeeper Alliance

P.O. BOX 21 Orleans, CA 95556 530 627 3280 541 951 0126 kiamath@riseup.net

May 25, 2007

Stephen Johnson, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Wayne Natri
Regional Administrator (R-1)
U.S. Environmental Protection Agency Region IX
75 Hawthorne Street, San Francisco, CA 94105

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: Sixty-Day Notice of Violations of the Clean Water Act and Notice of Intent to File Suit
Concerning EPA Approval of California's Clean Water Act Section 303(d) list of Water
Quality Limited Segments and Associated Pollutants/Pollution

Dear Messrs. Johnson and Natri:

The Klamath Riverkeeper ("Riverkeeper") hereby notifies you of the United States Environmental Protection Agency's ("EPA") failure to perform certain mandatory duties under the Federal Clean Water Act ("CWA"). Specifically Riverkeeper notifies you of EPA's failure to complete approval of an appropriate CWA Section 303(d) list of water quality limited segments ("WQLSs") and associated pollutants/pollution for California (the "California 303(d) List").

The purpose of this letter is to provide notice of Riverkeeper's intent to file a CWA citizen suit sixty (60) days after the date of this letter against the EPA Administrator and the Regional Administrator of EPA Region IX for EPA's failure to perform its CWA mandatory duty to approve an appropriate 303(d) list for California within the statutory deadlines.

I. IDENTITY OF PERSONS GIVING NOTICE AND THEIR COUNSEL

Pursuant to 40 C.F.R. Section 135.3(b), Riverkeeper hereby gives notice of the names, addresses, and telephone numbers of the persons giving notice.

Riverkeeper is a non-profit public benefit corporation organized under the laws of the State of California. Riverkeeper's members recreate throughout the Klamath River watershed, engaging in fishing, hiking, boating and observing wildlife. Members of Riverkeeper use Klamath River waters both within and downstream of the Iron Gate and Copco Dam Reservoirs ("the Reservoirs"). Since its formation, Riverkeeper has been directly involved in numerous water quality proceedings regarding the Klamath River, including Total Maximum Daily Load

W. Nastri
A. Strauss
May 25, 2007
Page 2 of 5

("TMDL") development for the river as well as its tributaries. Riverkeeper's contact information is the following:

Regina Chichizola
Klamath Riverkeeper
P.O. Box 21
Orleans, CA 95556
Phone: (530) 627-3280
Email: klamath@riverkeeper.net

Riverkeeper has retained the following legal counsel to represent them in this matter:

Daniel Cooper
Lawyers for Clean Water, Inc.
1004 O'Reilly Avenue
San Francisco, CA 94129
Phone: (415) 440-6520 x204
Email: cleanwater@sfo.com

II. MANDATORY PROVISIONS OF THE CLEAN WATER ACT

Under the CWA, every State must adopt and submit to the EPA for approval a list of waters within its boundaries for which the technology-based effluent limitations required by 33 U.S.C. § 1311(b)(1)(A) and (B) are not stringent enough to ensure attainment of applicable California water quality standards ("WQS"). See CWA § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A). CWA Section 303(d)(2) requires EPA to approve or disapprove a State's list of such WQS impaired waters "not later than thirty days after submission." 33 U.S.C. § 1313(d)(2). CWA Section 303(d)(2) further provides that if EPA partially disapproves any such State list, EPA "shall not later than thirty days after the date of disapproval" adopt such supplemental list as EPA "determines necessary." *Id.* In sum, CWA Section 303(d)(2) imposes on EPA a mandatory duty to issue a supplemental EPA CWA Section 303(d) list no more than sixty days after a State submits an inadequate list (i.e., EPA has thirty days to disapprove the list and another thirty days to adopt its own supplemental list).

III. EPA'S FAILURE TO PERFORM ITS MANDATORY CWA DUTIES

EPA partially approved California's 303(d) List on November 30, 2006, and then subsequently partially disapproved this list on March 8, 2006. Riverkeeper commends EPA's partial disapproval of California's clearly inadequate list, which failed to include the listing urged by Riverkeeper's April 13, 2007 letter. Riverkeeper is concerned, however, that EPA has not acted to adopt an adequate supplemental California 303(d) list that adds that the Klamath River and the Reservoirs are failing to attain applicable WQS set forth in the California Regional Water Quality Control Board, North Coast Region's ("Regional Board") Water Quality Control Plan for the

North Coast Region ("the Basin Plan") due to the contamination of these waters with elevated levels of *Microcystis aeruginosa* and microcystin toxin.

As EPA is aware, Riverkeeper wrote a comment letter to EPA on April 13, 2007 concerning EPA approval of the California 303(d) List, referred to in EPA's Federal Register Notice, 72 Fed. Reg. 12175 (March 15, 2007). Riverkeeper urged EPA to amend the California 303(d) List to add that the Klamath River and the Reservoirs are failing to attain applicable WQS set forth in the Basin Plan due to the contamination of these waters with elevated levels of *Microcystis aeruginosa* and microcystin toxin.

Riverkeeper's April 13 letter pointed out that the presence of *Microcystis aeruginosa* and microcystin toxin is causing the Klamath River and the Reservoirs not to meet Basin Plan water quality objectives for toxicity, color, floating material, suspended material biostimulatory substances, and odors. The letter further noted that the presence of *Microcystis aeruginosa* and microcystin toxin in the Klamath River and the Reservoirs are preventing these waters from meeting their designated beneficial uses including, Native American cultural uses, water contact recreation, non-contact water recreation, commercial and sportfishing, subsistence fishing, warm freshwater habitat, cold freshwater habitat, wildlife habitat; habitat for rare, threatened, or endangered species; migration of aquatic organisms; and spawning, reproduction, or early development of aquatic organisms. The April 13 letter urged EPA to adopt an amended California 303(d) list specifying that the Klamath River and the Reservoirs fail to meet these Basin Plan water quality objectives and designated beneficial uses. As noted in Riverkeeper's letter, 40 C.F.R. § 130.7(b)(1), (3) and (d) requires the States and/or EPA to include in 303(d) lists waterbodies that fail to meet "any water quality standards," including narrative standards.

The April 13 letter also urged EPA to specify that *Microcystis aeruginosa* and microcystin toxin are the "pollutants" that are causing these waters not to meet the Basin Plan WQS. 40 C.F.R. § 130.7(b)(4) requires the States and/or EPA to "identify the pollutants causing or expected to cause violations of the applicable water quality standards." See also EPA 303(d) Guidance ("40 C.F.R. Section 130.7(b)(4) requires States to identify, in each Section 303(d) list submitted to EPA, the 'pollutants causing or expected to cause violations of the applicable water quality standards'"). *Microcystis aeruginosa* and microcystin toxin are well documented to be the "pollutants" that are causing these waters not to meet the Basin Plan WQS at issue. *Microcystis aeruginosa* and microcystin toxin are "pollutants" within the meaning of the CWA. See CWA § 502(6), 33 U.S.C. § 1362(6) (pollutant includes "biological materials"); *National Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988); *United States v. Hamel*, 551 F.2d 107 (6th Cir. 1977).

EPA has yet to act on the comments in the April 13 letter and has not yet issued a final decision adopting a complete California 303(d) list. EPA's adoption of a supplemental California 303(d) list is overdue. As noted above, the State Water Resources Control Board ("State Board") submitted its CWA Section 303(d) list to EPA for approval on November 24, 2006. CWA Section 303(d)(2) requires EPA to have approved or disapproved California's originally submitted 303(d) list "not later than thirty days after submission," i.e., by December 24, 2006. CWA Section

303(d)(2) further provides that once EPA partially disapproved the California CWA 303(d) List, EPA has until "not later than thirty days after the date of disapproval" to adopt such supplemental list as EPA "determines necessary." In sum, CWA Section 303(d)(2) imposes on EPA a mandatory duty to issue supplemental EPA CWA Section 303(d) lists no more than sixty days after a State submits an inadequate list (i.e., EPA has thirty days to disapprove the list and another thirty days to adopt its own supplemental list). Accordingly, EPA had until January 23, 2007 to adopt its own supplemental list adding to California's inadequate original CWA Section 303(d) list submitted on November 24, 2006. Even if EPA were to count its deadline to adopt its supplemental list as running from its March 8, 2006 partial disapproval of the California 303(d) list (more than two months after the statutory deadline), EPA's deadline for adopting its own supplemental list would have expired on May 7, 2007.

IV. NOTICE OF INTENT TO SUE EPA FOR VIOLATIONS OF THE CLEAN WATER ACT

Riverkeeper contends that EPA has failed in the respects set forth above to comply with the CWA's requirements to finalize EPA approval of a legally adequate California 303(d) list. CWA Section 505(b) requires that a citizen give notice of intent to sue sixty (60) days prior to the initiation of a civil action under CWA Section 505(a). 33 U.S.C. § 1365(b). 40 C.F.R. Section 135.2 provides that, if a citizen suit is based on the failure of the EPA Administrator to perform a nondiscretionary duty, service of notice shall be accomplished by certified mail addressed to, or by personal service upon, the EPA Administrator. This Section further provides that a copy of the notice must be mailed to the Attorney General of the United States. Accordingly, this notice is being sent to you as the head and Administrator of the EPA and the Regional Administrator of Region IX. In addition, a copy of this notice is being sent to the Attorney General.

By this letter, pursuant to 33 U.S.C. § 1365(a) and (b), Riverkeeper hereby puts you on notice that after the expiration of sixty (60) days from the date of this Notice of Intent to File Suit, Riverkeeper intends to file an enforcement action in Federal Court against EPA, the Administrator and the Regional Administrator in their official capacities for their failures to perform mandatory Clean Water Act duties.

Riverkeeper intends to seek declaratory and injunctive relief establishing and compelling EPA to perform its CWA mandatory duties pursuant to 33 U.S.C. § 1365(a) and (d), and such other relief as is permitted by law. Lastly, Riverkeeper will seek to recover their attorneys fees, expert fees and costs pursuant to 33 U.S.C. § 1365(d).

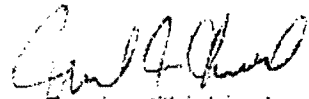
Riverkeeper is interested in discussing effective remedies for the EPA's breaches of a mandatory duty noted in this letter. Riverkeeper requires that the EPA immediately adopt an amended California 303(d) list specifying that, due to the contamination of these waters with elevated levels of *Microcystis aeruginosa* and microcystin toxin, the Klamath River and the Reservoirs are failing to attain applicable Basin Plan WQS for the following water quality objectives: toxicity, color, floating material, suspended material biostimulatory substances, and odors, and for the following designated beneficial uses: Native American cultural use, water contact recreation, non-contact water recreation, commercial and sportfishing, subsistence fishing,

W. Nastri
A. Strauss
May 25, 2007
Page 5 of 5

warm freshwater habitat, cold freshwater habitat, wildlife habitat; habitat for rare, threatened, or endangered species; migration of aquatic organisms; and spawning, reproduction, or early development of aquatic organisms. EPA action is urgently needed given the grave public health and ecosystem risks posed by *Microcystis aeruginosa* and microcystin toxin contamination of the Klamath River and the Reservoirs.

If you wish to pursue such discussions in the absence of further litigation, we suggest that you initiate those discussions within the next 15 days so that they may be completed before the end of the sixty-day notice period. Although Riverkeeper is interested in avoiding unnecessary litigation, Riverkeeper does not intend to delay the filing of a complaint in Federal Court if discussions are continuing when the notice period ends.

Sincerely,


for Regina Chichizola
Klamath Riverkeeper

cc: Alberto Gonzales, U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Alexis Strauss
Director Water Division (WTR-1)
U.S. Environmental Protection Agency Region IX
75 Hawthorne St.
San Francisco, CA 94105